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The American Law Institute

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FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)

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some State laws make provision for executing such requests. See, e.g., N.Y. C.P.L.R. § 328.

4. *Service of foreign process by U.S. marshal.* Though U.S. marshals no longer serve initial process except for specified types of actions, Reporters' Note 1, they maintain responsibility for serving foreign civil process pursuant to letters rogatory or lettes of request. Unless personal service is requested in the letter, service by Marshals will be made in accordance with Rule 4(c)(2)(C)(ii), i.e., by first class mail.

5. *Service abroad and State law.* Many State provisions concerning service of process outside the jurisdiction require that such service be made "in the same manner as service is made within the state." See, e.g., N.Y. C.P.L.R. § 313, Ill. Code of Civ. Pro. § 2-208(b). However, while service wherever made must in general be authorized by the law of the forum, § 471, Comment *a*, precise conformity to that law in respect of manner of service is not required when service is made pursuant to the Convention. For instance, N.Y. C.P.L.R. § 308(2) and Ill. Code of Civ. Pro. § 2-203 provide that if the summons is left at the defendant's residence in the custody of a "person of suitable age and discretion," a copy must also be mailed to the defendant's last known residence; but if the Central Authority designated by a foreign state arranges for delivery of the summons to defendant's spouse at their residence and the foreign state's law does not require additional mailing, the service would be effective. If the Convention were not applicable, the same manner of service would not be effective under Illinois or New York law. Cf. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir.), cert. denied, 454 U.S. 1085 (1981). Correspondingly, when litigation in a foreign state is commenced by service in a State of the United States in compliance with the Convention, the fact that absent the Convention such service would not have been sufficient under the law of the State where service was made does not vitiate the effect of the service or of a judgment rendered thereon, because the Convention prevails over State law. Aspinall's Club, Ltd. v. Aryeh, 86 A.D.2d 428, 450 N.Y.S.2d 199 (2d Dep't 1982). Service of process in a law suit pending in a Convention state in compliance with State law but not with the Convention is not effective service. Cintron v. W & D Machinery Company, Inc., 182 N.J. Super. 126, 440 A.2d 76 (1981); Low v. Bayerische Motoren Werke, A.G., 88 A.D.2d 504, 449 N.Y.S.2d 733

(1st Dep't 1982). A U.S. court of appeals has held that where service on a foreign defendant was ineffective because of failure to meet the requirements of the Convention, the plaintiffs should be given a reasonable opportunity to comply with the Convention, notwithstanding the fact that the statute of limitations governing the action had run in the interval. Vorhees v. Fischer & Krecke, 697 F.2d 574 (4th Cir. 1983).

6. *Service in actions against foreign states.* The rules stated in this section do not apply to service on foreign states or state instrumentalities, which are governed by a special regime. See § 457.

§ 473[483]. Obtaining Evidence in Foreign State

(1) Under international law, a state may determine the conditions for taking evidence in its territory in aid of litigation in another state, but the state where the litigation is pending may determine its admissibility, probative value and effect.

(2) Under the Hague Evidence Convention,

> **(a) each contracting state is required to designate a Central Authority to which letters of request seeking assistance in obtaining evidence for use in civil or commercial litigation may be addressed by courts of other contracting states, and the Central Authority must direct that any letter of request meeting the requirements of the Convention be executed expeditiously, in accordance with the procedures, including measures of compulsion, that are applicable to**

taking of evidence for use in the requested state's courts;

(b) a contracting state may determine the conditions for taking evidence in its territory without compulsion, by diplomatic or consular officers, or by commissioners designated by a court in another contracting state, for use in civil or commercial litigation pending in that state.

(3) A person required or requested to give evidence for use in a foreign state, whether pursuant to the Hague Evidence Convention or through other arrangements for judicial assistance, may refuse to do so in so far as he has a privilege or a duty of nondisclosure under either the law of the state of origin of the request or of the state in which the evidence is sought.

Source Note:

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, signed at The Hague March 18, 1970, 23 U.S.T. 2555; T.I.A.S. No. 7444, _____U.N.T.S. _____, reproduced (with declarations by the Contracting States) in 28 U.S.C.A. following § 1781. For U.S. implementation, see also 28 U.S.C. §§ 1781–82, Fed. R. Civ. P. 28(b).

Comment:

a. Admissibility of evidence obtained in foreign state. In general, subject to the rule as to privileges, Subsection (3), the admissibility of evidence lawfully obtained in one

state for use in litigation in another state is determined by the law of the latter state. The fact that evidence lawfully obtained in State *B* would not be admissible in a proceeding in that state, for example because it would be considered hearsay not covered by an exception, is not a ground for excluding the evidence in State *A*, and the fact that evidence would be admissible in *B* is not a ground for admitting it in *A*. However, evidence obtained by unlawful means in *B*, for instance by a prohibited wiretap, might not be admitted in *A*, even if in comparable circumstances the means employed in *B* would have been lawful in *A*.

b. Scope and purpose of Hague Evidence Convention. The Hague Evidence Convention provides for the gathering of evidence in one contracting state for use in another contracting state in two distinct ways—1) by letters of request (or letters rogatory), addressed by the court of the requesting state to a Central Authority designated by another contracting state, seeking assistance in obtaining evidence through compulsory process, Subsection (2)(a); and 2) by commissions issued by the court to consular officers of the requesting state, or to specially appointed persons, directing them to take evidence in a foreign state, generally without compulsory process, Subsection (2)(b). Execution by courts of letters of request duly sent by courts of another contracting state is required under the Convention (Chapter I). Since taking evidence by a foreign commission is a function regarded by many states as an official act of the foreign state, the Convention provides that contracting states may refuse to permit execution of such commissions in their territory, or may give permission subject to conditions (Chapter II). Contracting states may opt out of Chapter II in its entirety, or with respect to one or more of its articles.

Nothing in the Convention expressly obligates courts of a contracting state to resort to the Convention procedures

as the exclusive means to obtain evidence abroad, but some courts have held that if the Convention is available and the state where the information is located has declared that the Convention provides the exclusive means to obtain evidence in its territory, then the procedures under the Convention must be utilized before discovery under the domestic law of the forum will be ordered. See Comment *i* and Reporters' Note 6. The Convention expressly provides that contracting states may permit the taking of evidence in their territory under less restrictive conditions than those provided for in the Convention.

c. "Civil or commercial matters." the Hague Evidence Convention, like the Hague Service Convention, applies only in aid of civil or commercial litigation. The United States position in respect of letters of request under the Evidence Convention, is, in general, the same as under the Service Convention, § 471, Comment *f*, i.e., letters of request to be used in administrative proceedings, including proceedings concerning fiscal matters, will in principle be honored. Other contracting states may distinguish between requests on behalf of private parties involved in administrative (including fiscal) proceedings, which might well be honored, and requests on behalf of administrative authorities or tribunals, including, for example, the U.S. Tax Court, which would probably be refused. If evidence is sought in connection with both a civil and a criminal or public matter, the requested state need not comply with the request. Cf. Reporters' Note 7(iv).

d. "Judicial Authority." The Hague Evidence Convention applies only to requests transmitted by or on behalf of a judicial authority, and only in respect of evidence to be used in judicial proceedings, commenced or contemplated. Thus, a request for evidence to be used by a legislative committee, commission of inquiry, or similar body would not

come under the Convention, even if the request came from a judge acting as a commission or court of inquiry, or from a court whose jurisdiction had been invoked in aid of the committee or commission.

A request in support of judicial proceedings not yet commenced may be used only to preserve testimony of a person whose availability to give evidence is in doubt because of old age, illness, or expected departure from the requested state, as determined by the court making the request, according to criteria comparable to those set out in Fed. R. Civ. P. 27.

e. The Central Authority under Hague Evidence Convention. Under Subsection (2), reflecting Chapter I of the Convention, the Central Authority is obligated to receive letters of request from judicial authorities of other contracting states and to transmit them to the court or other competent authority for execution; the record establishing execution of the letter of request is to be returned by the court or other authority executing the letter to the Central Authority, which in turn is obligated to forward it to the requesting authority by the same channel that was used to submit the letter of request. The Central Authority for receipt of letters of request under Chapter I of the Convention may or may not be the body to which requests for permission to execute commissions under Chapter II are addressed, and it may or may not be the same as the Central Authority designated pursuant to the Service Convention, § 471. If a state has more than one Central Authority and a judicial authority in the requesting state addresses its letter of request to the wrong Central Authority, that authority is obligated to forward it to the authority competent to execute the request. For the United States the Central Authority is the U.S. Department of Justice. 28 C.F.R. § 0.49. See § 474, Reporters' Note 2.

f. Procedure for examination of witnesses under Convention. Article 9 of the Evidence Convention provides that the judicial authority that executes a letter of request shall apply its own law as to the methods and procedures to be followed, but that it will follow a request that a special method or procedure be followed, unless this is incompatible with the internal law of the state of execution or is impossible of performance. In particular, most civil law courts have permitted letters of request from common law states to be executed by having witnesses testify under oath, with stenographic transcripts, and with questioning by counsel for the parties. Correspondingly, common law states executing letters of request from civil law states permit testimony of witnesses to be recorded in summary form prepared by the examining officer and approved by the witness, if the letter of request so specifies.

g. Refusal to execute letter of request. Article 5 of the Convention provides that if a Central Authority declines to execute a letter of request, it must promptly notify the requesting authority, specifying its objections. Apart from the objections to pre-trial discovery specially provided for, Comment *h* and Reporters' Note 6, objections may relate to failure to meet the requirements of the Convention concerning "civil or commercial" litigation, "judicial" proceedings, and form or language of the letter of request. Article 12 states that if these requirements have been met, execution of a letter of request may be refused only to the extent that such execution would not fall within the function of the judiciary of the requested state or that that state considers that its sovereignty or security would be prejudiced by execution of the request. For an example of resort to the "sovereignty or security" provision, see Reporters' Note 7(v).

h. Pre-trial discovery and the Hague Evidence Convention. Article 23 of the Convention permits contracting

states to declare that they will not execute Letters of Request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries," and [as of 1984] all contracting states except the United States, Czechoslovakia, and Israel had made such a declaration. Article 23 applies only to production of documents, and does not preclude examination before trial of witnesses pursuant to letters of request. However, the Article 23 declaration made by a number of states recites the understanding that it precludes asking a witness to state what documents relevant to the proceeding are in his possession, custody or power. See Reporters' Note 4.

i. Relation of Hague Evidence Convention to U.S. discovery orders. While courts are not required to resort to the Convention to obtain evidence abroad, Comment *b*, the Convention may in fact provide the only means of obtaining evidence from non-parties to the litigation who reside in other contracting states. With respect to parties to the litigation, courts in the United States have divided over whether to require litigants to utilize the procedures of the Convention when they are available. Reporters' Note 6. However, if it is clear that a letter of request would not be honored, for instance because the evidence sought is documentary and is located in a state that has made a declaration under Article 23, see Comment *h*, a court in the United States may, subject to the rules governing foreign discovery, § 437(1), issue a discovery order without requiring resort to the Convention.

In accordance with Subsection (3), if a witness examined pursuant to a Letter of Request under the Convention refuses to answer questions in reliance on a privilege available in the requested state, no adverse inference may be drawn or sanction imposed. However, if the person to be examined is a party or is affiliated with a party before the requesting

court, the court may treat the failure to make disclosure like other failures to respond to discovery orders, § 437(2).

j. Evidence taken by consuls or commissioners. Both under the Convention and under international law generally, permission for foreign diplomatic or consular officers or court-appointed commissioners to take evidence in a state may be given generally, or for a particular case or witness. The permission may be limited to accredited consular officers of the requesting state, or it may extend to commissioners appointed by the court where the litigation is pending. Commissioners may be nationals of the state of the forum or of the state where the evidence is to be taken, and they may be court officers, attorneys practicing in the requested state, or even attorneys involved in the litigation. The permission may be limited to take evidence from nationals or residents of the requesting state, or it may extend to taking evidence from nationals of the requested state or of a third state.

k. Use of letter of request after failure of commission procedure. As Article 22 of the Convention makes clear, if an attempt to secure evidence by commission under Chapter II is unsuccessful because a witness refuses to give evidence, the party seeking the evidence may apply to the court where the action is pending for issuance of a letter of request for the same evidence, which would be subject to measures of compulsion under Article 10 (Subsection (1) of this section).

REPORTERS' NOTES

1. *Letters rogatory under general law and letters of request under the Convention.* Letters rogatory addressed by the courts of one state to courts of another state apart from the Hague Evidence Convention are essentially the same as "letters of request" submitted pursuant to the Convention, except that the former are voluntary or depend on bilateral arrangements and ordinarily involve diplomatic channels, while execution of the latter is required by treaty and does not involve diplomatic channels.

Many states not parties to the Convention, including for instance Switzerland, as well as the Canadian provinces, regularly execute letters rogatory, and U.S. courts regularly execute letters rogatory addressed to them from those and other noncontracting states.

In general, the grounds for refusal to execute letters of request under the Convention, Comments *g* and *h*, apply to the practice of states with respect to letters rogatory apart from the Convention, but letters rogatory not falling under the Convention are not limited to civil or commercial matters, and in fact often are used in connection with criminal proceedings. See, e.g., § 474, Reporters' Note 5. Generally, letters rogatory apart from the Convention are transmitted from a court of one state through diplomatic channels to a court in another state if the appropriate court is known; if that court is not known, letters rogatory may be transmitted through the consulate of the requested state in the state of origin, or through the consulate of the state of origin in the requested state, with a request to send it to the appropriate court. For the United States, the Department of State is authorized to receive a letter rogatory issued by a foreign court and transmit it for execution to the appropriate court or agency in the United States, and to forward letters rogatory issued by a court in the United States to the appropriate court or agency in the foreign state. 28 U.S.C. § 1781.

2. *Content of letter of request under Hague Convention.* The appropriate content of a letter of request under the Convention is set forth in Article 3, and a recommended model form is reproduced following the text of the Convention in 28 U.S.C.A. § 1781. In particular, under the model form, if any special method of taking evidence is requested, or if any privilege under the law of the state of origin may be applicable, the letter of request should so state.

3. *Language of letter of request under Hague Convention.* Letters of request may be submitted in (or accompanied by certified translations into) English or French, except if the requested state has filed a declaration that it will accept letters of request only in its own official language. The United States will accept letters of request in English or French, and if intended to be executed in Puerto Rico, in Spanish. Several contracting states have filed declarations that they will accept letters of request in additional languages. A state that has agreed to accept a letter of request in a

language other than its own does not thereby agree to execute or return the request in that language.

4. *Pre-trial discovery and evidence needed for trial: Effect of declarations.* Some litigants in the United States have sought to overcome the obstacle to foreign document discovery presented by declarations of foreign states under Article 23 of the Hague Evidence Convention, Comment *h*, by asking the judge to certify in the letter of request that the documents being sought are for use in the trial. The more clearly the evidence sought can be tied to issues in the trial, and the more specifically that evidence sought is described in the letter of request, the more likely it is that courts or other authorities in the requested state will be persuaded that the evidence sought does not come within the excluded category of "pre-trial" discovery. As of [1984], however, few foreign courts or Central Authorities had been so persuaded. See, e.g., two related decisions concerning letters of request sent to the Federal Republic of Germany together with a certification from the U.S. district judge that the evidence was needed for trial of a patent/antitrust action pending before him. The German court, strictly construing Article 23 of the Convention and the declaration thereunder, denied a request for production of specified documents, but upheld an order to several witnesses to be examined about the same documents. Corning Glass Works v. International Telephone and Telegraph Corp., OLG München. 10/31/80; 11/27/80, 1981 Juristenzeitung 538, 540, reproduced in English in 20 Int'l Leg. Mats. 1049, 1025 (1981).

While a majority of parties to the Evidence Convention have made blanket objections under Article 23, Comment *h*, Great Britain, Singapore, Denmark, Finland, Norway and Sweden have in their declarations limited their objections to requests that (a) require a person to state what documents relevant to the proceeding are or have been in his possession or custody, or (b) do not specify with particularity documents to be produced. Thus while these states, following Great Britain, restrict "fishing expeditions," i.e., requests for "all memoranda, correspondence, or other documents relating [to the subject of the request]," they will honor requests for specific documents known by the applicant to be in possession of the witness.

5. *Relation of international judicial assistance to rules for U.S. discovery orders.* The rules governing discovery of evidence

abroad for use in courts in the United States, § 437, apply to discovery conducted by use of international judicial assistance as well as to discovery orders directed to parties without the use of the Evidence Convention or other international channels. Thus, a court in the United States issuing a letter of request for foreign discovery must consider the matters listed in § 437(1)(c), in particular the importance to the litigation of the information requested; the specificity of the request; and the origin of the information. Use of the Convention or other means of international judicial assistance commits the issue of whether compliance with the request would undermine important interests of the state where the information is located to the courts or other authorities of that state, subject (where the Convention applies) to the Convention's constraints on refusal to comply with requests duly submitted, Comment *g*.

6. *U.S. discovery orders and resort to the Convention.* It is not settled whether parties to litigation in the United States may be required to give depositions, disclose documents, or respond to other discovery devices directed to information located in foreign contracting states without resort to the Convention, but under the final clause of § 437(1)(c), the possibility of resort to international judicial assistance must be considered by the court prior to issuing a discovery order directed to a party. In three product liability cases involving alleged defects in automobiles manufactured in the Federal Republic of Germany, intermediate appellate courts in California have reversed discovery orders directed to German defendants "in the exercise of judicial restraint based on comity," and insisted that the attempt be made in the first instance to secure the evidence through letters rogatory (before the Federal Republic became party to the Convention) or through letters of request pursuant to the Convention. Volkswagenwerk Aktiengesellschaft v. Superior Court, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973); Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982). *Accord:* Schroeder v. Lufthansa German Airlines, 18 Av. L. Rep. ¶ 17,222 (N.D. Ill. 1983). In situations in which genuine issues of privilege or compulsion to refuse disclosure are raised, resort to the Convention enables the courts or other authorities of the state where the information is located to rule on these issues, thus giving guidance to courts in the United

States in making rulings in accordance with § 437(2). In situations where the effort to secure disclosure of documents is certain to be met by refusal to permit "pretrial" discovery, Comment *h* and Notes 4 and 5, neither the Convention nor the requirement of reasonableness in the exercise of jurisdiction, § 421(1), obligates a court in the United States to refrain from issuing a discovery order to a party over which the court has jurisdiction. See In re Anschuetz & Co. GmbH, 754 F.2d 602 (5th Cir. 1985); Lasky v. Continental Products Corporation, 569 F.Supp. 1227 (E.D. Pa. 1983); Murphy v. Riefenhauser KG Maschinenfabrik, 101 F.R.D. 360 (D. Vt. 1984); Laker Airways, Ltd. v. Pan American World Airways, 103 F.R.D. 42 (D.D.C. 1984). *Contra:* Philadelphia Gear Corporation v. American Pfauter Corporation, 100 F.R.D. 58 (E.D. Pa. 1983). See also Volkswagenwerk A.G. v. Falzon (stay of discovery granted), 461 U.S. 1303 (1983); appeal dismissed, 104 S. Ct. 1260 (1984). For an important case in which the parties were ordered to resort first to the Hague Convention for evidence located in France, but thereafter questions of failure to make full disclosure were treated as under § 437, see Compagnie Francaise D'Assurance pour le Commerce Exterieur v. Phillips Petroleum Co., ____F. Supp. ____ (S.D.N.Y. 1984).

If execution of a letter of request of a court in the United States is refused by the Central Authority or court of a contracting state, the court that issued the letter of request is not precluded by the Convention from issuing such orders or drawing such inferences as seem appropriate. See § 437, especially Comments *b* and *c*.

7. *The Westinghouse case and the Evidence Convention.* Several aspects of the Convention came before the British House of Lords in Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., [1978] A.C. 547, (H.L.(E.)). A series of actions had been brought against Westinghouse in the United States based on Westinghouse's failure to meet its commitments to furnish uranium to plaintiff utility companies. Westinghouse pleaded commercial impracticability because the world price had increased seven-fold, and in support of that defense it sought to prove the existence of an international uranium cartel. At Westinghouse's request the U.S. district court addressed a letter rogatory to the High Court in London, seeking documentary evidence from a British company,

and testimony from several of its officers. The rulings of the House of Lords included the following:

(i) A statement by the requesting judge that the evidence requested was sought for trial, not just for "pretrial" discovery, was sufficient to overcome Britain's declaration under Article 23, at least where the evidence was specifically identified.

(ii) Requests for production of documents not specifically identified were rejected, on the ground that the Convention and the British implementing legislation did not countenance "fishing expeditions," citing Radio Corporation of America v. Rauland Corp., [1956] 1 Q.B. 618 at 649 (C.A.), § 437, Reporters' Note 1. Only particular documents identified as to date, authorship, and subject would be ordered produced from non-party witnesses.

(iii) If a letter contained both specific and overly general requests, the letter rogatory would not be rejected as a whole, but the court could separate the acceptable from the unacceptable requests, "blue-pencilling" the rest.

(iv) So long as the requests were, in good faith, intended for use in the court from which they emanated, the possibility that the evidence so obtained might be used for discovery in connection with another proceeding was not a ground for denying the request.

(v) A request by the U.S. Attorney General to the U.S. judge to grant the witnesses immunity, and compel them to testify, notwithstanding a claim of possible self-incrimination, in order to aid the work of a grand jury investigating the uranium cartel, "materially altered the character of the proceedings under the Letters Rogatory," so that it no longer came within the category of "civil and commercial." Moreover, the U.S. investigation of the activities of British companies outside the United States was "an unacceptable invasion of British sovereignty," within the meaning of Article 12 of the Convention. Accordingly, the letters rogatory were refused in all respects.

8. *The Hague Convention and blocking statutes.* When all forms of disclosure for purposes of foreign legal proceedings are prohibited by a blocking statute, § 437, Reporters' Notes 4 and 5, disclosure via the Convention route will be likewise blocked, generally by reference to Article 12(b) concerning prejudice to the requested state's sovereignty or security. However, some states that enacted blocking statutes against unilateral assertion of ju-

risdiction by the United States are less concerned to block requests for evidence when their own judiciary is given the opportunity to screen such requests, as under the Hague Convention. For instance, both of the operative sections of France's Law relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons, reproduced in English in 75 Am. J. Int'l L. 382 (1981), apply "except when international treaties or agreements provide otherwise," and a request for evidence made under the Hague Convention—whether under Chapter I or Chapter II—is not subject to the absolute prohibition in Article 1 *bis* against furnishing evidence of an economic, commercial, industrial, technical or financial nature intended for use in a foreign legal proceeding. However, the prohibition in Article 1 against furnishing such information if doing so would threaten the sovereignty, security or essential economic interests of the state, appears not to conflict with the Convention, and requests for such information could be refused.

9. *Permission to execute commissions under Hague Convention.* As of [1984] only Finland and the United States had given general permission to consuls and other commissioners appointed by foreign courts to take evidence in their territories; Czechoslovakia and the United Kingdom had filed declarations granting advance permission to consuls only, but indicated that permission could be given to commissioners as well in particular cases. Italy and the United States declared that consuls and commissioners appointed in accordance with Articles 15–17 of the Convention could apply to the appropriate court for assistance in obtaining evidence by compulsion; the United Kingdom and Czechoslovakia had made a similar declaration, subject to reciprocity. In other contracting states permission to take evidence by commission must be sought in particular cases, and unwilling witnesses may not ordinarily be ordered to give evidence.

10. *The Hague Legalisation Convention.* Even before it prepared the Service and Evidence Conventions, the Hague Conference on Private International Law prepared a Convention Abolishing the Requirement of Legalisation of Foreign Public Documents, done at The Hague October 9, 1961. The United States became a party in 1981. _____U.S.T. _____, T.I.A.S. No. 10072, 527 U.N.T.S. 189. The purpose of the Convention, which as of

[1984] had 29 parties, is to simplify the system of authentication of foreign official documents sought to be introduced into evidence in judicial or comparable proceedings, by eliminating the requirement of chain authentications from local officials through national officers to certification through diplomatic channels. Cf. Fed. R. Civ. P. 44(a)(2), Fed. R. Ev. 902(3). The Convention, reproduced in 28 U.S.C.A. following Rule 44, provides for a single form of authentication known by the French word *Apostille.* An Apostille certifies the authenticity of the signature of the person who has signed a document, the capacity in which he or she has acted, and where appropriate the identity of the seal or stamp which the document bears. Each contracting state designates the authorities competent to issue Apostilles, and each authority so designated keeps a record or index of all Apostilles issued. A foreign document bearing an Apostille issued in the prescribed form is authenticated for use in judicial or other official proceedings in all other contracting states as a matter of treaty right, notwithstanding more onerous provisions for legalization of foreign documents in preexisting treaties or domestic law. See, e.g., the Opinion of the Attorney General of California reproduced in 21 Int'l Leg. Mat. 357 (1982). The fact that a document bears an Apostille does not, however, of itself affect the probative value of the content of the document.

For the United States, the designated authorities include the Authentication Office of the Department of State for all records of executive agencies; the clerks and deputy clerks of all federal courts for the records of their courts; and the secretaries of state or comparable State officials for all other documents. The Legalisation Convention is not limited to civil or commercial matters, but for the United States does not apply to requests for extradition, which must meet the requirements of 18 U.S.C. § 3190. See § 479.

§ 474[484]. Obtaining Evidence in or for Use in Foreign State: Law of the United States

(1) A United States district court may execute a letter rogatory issued by a foreign tribunal by ordering a person residing or found in the district to give testimony or to produce a document or other thing

for use in a proceeding in the foreign tribunal.

(2) A United States district court, in order to obtain evidence for use in a proceeding before it, may

(a) issue a commission to a United States consul, or to any other person not related to the parties or counsel, to take testimony in a foreign state;

(b) issue a letter rogatory requesting a court or other appropriate authority in a foreign state to direct the taking of evidence in that state; or

(c) issue a subpoena ordering a national or resident of the United States in a foreign state to give evidence as directed by the U.S. court,

provided the procedure is not inconsistent with the law of the state where the evidence is to be taken.

Source Note:

28 U.S.C. §§ 1781–84; Fed. R. Civ. P. 28(b), 45(e); Fed. R. Crim. P. 15(d), 17(e).

Comment:

a. Judicial assistance rendered by U.S. courts. Subsection (1) applies equally to assistance requested by courts of contracting states of the Hague Evidence Convention, § 473, and to assistance requested by courts of other states. Assistance of U.S. courts under this section is available also

to foreign courts in criminal proceedings; to foreign authorities of a judicial character, such as investigating magistrates; and to international tribunals, whether or not the United States is a party to the agreement that created the tribunal in question.

b. Foreign commissions under U.S. law. In contrast to commissions of U.S. courts in foreign countries, § 473(2)(b) and Comment *j*, special permission is not required for execution of the commission of a foreign court to take evidence in the United States. A person seeking to execute such a commission, including a foreign consul, may apply to a U.S. district court for an order directing a witness within the district to give his testimony or produce a document or other thing.

c. Depositions without judicial intervention. In addition to the methods involving court orders set forth in Subsection (2), the Federal Rules of Civil Procedure authorize the taking of depositions outside the United States "pursuant to notice," i.e., without judicial intervention; such depositions must be conducted before a person authorized to administer oaths in the state where the examination is held, either by the law of that state or by the law of the United States. As in the case of commissions, some foreign states regard any examination for use in a judicial proceeding to be a judicial act, which may be conducted only with permission of the state where the examination is to take place.

d. Priorities among methods of judicial assistance. Rule 28(b) of the Federal Rules of Civil Procedure, as amended in 1963, makes clear that letters rogatory may be issued (i) without any finding that an alternate procedure, such as a commission or a deposition on notice, would be impracticable; and (ii) after a commission is used, if the evidence has not been obtained. Some U.S. courts have re-

quired resort to letters rogatory before issuing discovery orders regarding information located abroad, either as a matter of good will or as a way of securing the view of the court of a foreign state on an asserted claim of privilege or of prohibition against disclosure, but no rule requires this course. Compare § 473, Reporters' Notes 6 and 7. Subpoenas addressed to persons in foreign states in accordance with Subsection (2)(c) may be issued by U.S. courts only on the basis of a finding by the court that the person's testimony (or production of a document or other thing in his possession) is necessary in the interest of justice, and, in a civil action, that it is not possible to obtain the person's testimony (or production of the document or thing) in admissible form in any other manner.

e. Testimonial privileges of both requesting and requested state applicable. Under United States law, whether or not the Hague Evidence Convention applies, a person whose testimony is sought through letters rogatory or other forms of judicial assistance is entitled to the testimonial privileges applicable both in the state of origin of the request and in the state where the evidence is to be taken.

f. Admissibility of evidence taken abroad. Evidence obtained in response to a letter rogatory issued by a United States court need not be excluded because it is not submitted in the form of a verbatim transcript, or because the testimony was not given under oath, or for any similar departure from the requirements for depositions taken within the United States, but the court may in appropriate cases accord such evidence less probative value, or even exclude it entirely. Evidence obtained in response to letters rogatory issued by courts of States of the United States may or may not be excludable for the reasons cited, depending on the

rules of procedure and evidence applicable in the State where the evidence is to be used.

g. Letters rogatory and State courts. State courts in the United States may issue letters rogatory or commissions in accordance with Subsection (2) in the same way as federal courts, if their rules of procedure and evidence so provide. When requests of State courts for judicial assistance are issued in respect of evidence located in a state party to the Hague Evidence Convention, all the provisions of the Convention are applicable, § 473. Requests of State courts for judicial assistance from states not parties to the Convention may be transmitted by the Department of State pursuant to 28 U.S.C. § 1783, but State courts are not required by U.S. law to use the State Department in transmitting letters rogatory to foreign courts.

h. International judicial assistance and criminal proceedings. The provisions for international judicial assistance in the U.S. Code, 28 U.S.C. §§ 1781–82, make no distinction between civil and criminal proceedings, and U.S. courts have full authority to execute letters rogatory in aid of foreign criminal proceedings. Similarly, the authority for issuance by U.S. courts of letters rogatory or commissions, Fed. R. Civ. P. 28(b), is not limited to civil actions. Traditionally, U.S. courts and prosecutors in need of evidence located abroad have resorted only to subpoenas directed to U.S. nationals or residents, Subsection (2)(c). However, efforts to trace funds and other evidence of transnational crime, such as trafficking in drugs and terrorism, have led to increased international cooperation in law enforcement, pursuant to treaties of mutual assistance in criminal matters, greater use of letters rogatory, and a variety of less formal arrangements among governments and law enforcement agencies. For provisions concerning the use of international

judicial assistance contained in the Comprehensive Crime Control Act of 1984, see Reporters' Notes 6–8.

REPORTERS' NOTES

1. *Similarity of U.S. rules to Hague Convention rules.* The rules and statutes on which this section is based do not depend on the Hague Evidence Convention, but except for the use of the Central Authority under the Convention the practice in the United States as requested state is substantially the same under the Convention and apart from it. See Reporters' Note 2 and § 473, Reporters' Note 1. While the formal requirements of the Convention, § 473, Reporters' Notes 2 and 3, do not apply to requests for judicial assistance apart from the Convention, letters rogatory complying with these requirements are generally satisfactory for use with non-Convention states, and the same principles and practices will generally be applicable to proceedings apart from as well as under the Convention. See, in particular, § 473, Reporters' Note 6.

2. *U.S. practice in response to foreign letters rogatory.* Letters rogatory issued by foreign tribunals, Reporters' Note 4, may be addressed directly to the court requested to render judicial assistance, or they may be forwarded through diplomatic or consular channels to the Department of State, 28 U.S.C. § 1781. In practice the Department of State transmits all letters rogatory to the Civil Division of the Department of Justice, which in turn transmits them to the appropriate court or other authority, normally through the local U.S. attorney, just as it does with letters of request received pursuant to the Hague Evidence Convention, § 473, Comment *e.* For a survey of the practice of the Department of Justice both under and apart from the Convention, see Weiner, "In Search of International Evidence: A Lawyer's Guide Through the United States Department of Justice," 58 Notre Dame Lawyer 60 (1982).

A U.S. district court in receipt of a letter rogatory or a letter of request calling for taking of testimony normally appoints a commissioner or a U.S. magistrate to preside over the witness's deposition or to conduct the questioning. The commissioner may be a person specified in the letter of request, and may be a judge of the requesting court. By virtue of his appointment, the commissioner is authorized to obtain a subpoena ordering the witness to appear before him. If a deposition is taken pursuant to a letter rogatory issued at the behest of one party, counsel for the other party is entitled to be present and to cross-examine.

An order to take a person's evidence pursuant to a letter rogatory may be issued *ex parte* or on notice, but both the witness and a party to the underlying litigation may object to the order and may move to vacate or modify it. An order granting or denying execution of a letter rogatory is appealable to the court of appeals, without need to test the order by risking contempt proceedings. See In re Letters Rogatory Issued by Director of Inspection of Government of India, 385 F.2d 1017, 1018 (2d Cir. 1967); In re Request for Judicial Assistance from Seoul District Criminal Court, 555 F.2d 720, 721 (9th Cir. 1977).

3. *Reciprocity not required.* It is common practice for judges to close a letter of request to a foreign court with a statement that "... we shall be ready and willing to do the same for you in a similar case when required." However, a showing of reciprocity is not required for execution of letters rogatory in the United States, since Congress intended in adopting 28 U.S.C. § 1782 to take the initiative in rendering international judicial assistance. See In re Request for Judicial Assistance from the Seoul District Criminal Court, 428 F. Supp. 109, 112 (N.D. Cal. 1977). However, since in the absence of a treaty international judicial assistance is voluntary and often based on an expectation of reciprocity, if a party opposing execution of letters rogatory could demonstrate that the requesting court (or the state where that court is located) has in similar cases refused assistance to U.S. courts when requested, a court might in the exercise of discretion refuse its assistance.

4. *Foreign tribunals qualifying for judicial assistance under U.S. law.* In substantially revising 28 U.S.C. § 1782 in 1964, Introductory Note, p. 388, Congress substituted the word "tribunal" for the word "court" to make clear that assistance could be rendered to such bodies as the French "juges d'instruction," judicial officers charged with determining whether a prosecution should go forward. See H.R. Rep. No. 1952, 88th Cong., 1st Sess. p. 9 (1963), S. Rep. No. 1580, 88th Cong., 2d Sess. pp. 7–8 (1964). The critical factor in determining whether a foreign body qualifies as a tribunal under the statute is whether both parties to a liti-

gation are represented before it in equal degree. In re Letters Rogatory Issued by Director of Inspection of Government of India, 385 F.2d 1017 (2d Cir. 1967). Thus, investigating magistrates qualify, as does a court supervising an investigation by the public prosecutor, In re Letters Rogatory from Tokyo District, Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976), but not a foreign income tax office, *Director of Inspection of Government of India, supra,* or a Superintendent of Exchange Control, Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). A foreign Commission of Inquiry, even if authorized by its enabling statute to summon witnesses, has been held not to qualify as a tribunal under the statute. In re Letters of Request to Examine Witnesses from Court of Queen's Bench for Manitoba, Canada, 59 F.R.D. 625 (N.D. Cal.), aff'd 488 F.2d 511 (9th Cir. 1973).

The above factors determining qualification as a tribunal under the statute for purposes of judicial assistance by U.S. courts apply to international tribunals, Comment *a,* such as the Court of Justice of the European Communities, the Commission of the European Communities when exercising quasi-judicial powers, or international arbitral tribunals. See Smit, "International Litigation under the United States Code," 65 Colum. L. Rev. 1015, 1027 (1965).

5. *Judicial assistance by U.S. courts for use in foreign criminal proceedings.* Prior to 1949, U.S. courts did not execute letters rogatory or otherwise render judicial assistance to foreign courts in connection with criminal proceedings. In that year Congress amended the federal judicial assistance statute by substituting the term "judicial proceeding" for "civil action," Act of Aug. 24, 1949, c. 139, § 93, 63 Stat. 103. The 1964 revision of 28 U.S.C. § 1782 provides that the district courts may order a person to give testimony or other evidence "for use in a proceeding in a foreign or international tribunal," and this formulation has been construed to permit U.S. courts to render assistance in connection with foreign criminal as well as civil or administrative proceedings. In re Letters Rogatory From the Justice Court, District of Montreal, Canada, 523 F.2d 562 (6th Cir. 1975); In re Letters Rogatory from Tokyo District, Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976). The fact that the state of origin of a letter rogatory is a party to the Hague Evidence Convention, which does not apply to criminal proceedings, does not preclude submission of a request for judicial assistance in criminal proceedings, or execution of such a request

by a U.S. court. (For judicial assistance by way of extradition, see §§ 476–79).

6. *Foreign depositions for use in U.S. criminal cases.* Under 18 U.S.C. § 3507, enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, Oct. 12, 1984, any party to a federal criminal proceeding may apply to the court for appointment of a special master, to attend, and where appropriate, preside over an oral deposition of a witness in a foreign state. The court may appoint such a master and assign him such duties as the court directs (except deciding questions of privilege under a foreign law) to the extent permitted by the state where the deposition is to be conducted. The permission of the foreign state, including any conditions on the functions of the master, may be given for a particular deposition or proceeding, or it may be contained in a bilateral or multilateral agreement of general application.

7. *U.S. prosecutor's request for evidence located abroad and suspension of periods of limitation.* Pursuant to 18 U.S.C. § 3292, enacted as part of the Comprehensive Crime Control Act of 1984, Reporters' Note 6, the district court before which a grand jury is empanelled may, on request of the prosecutor, issue an order suspending the running of the applicable statute of limitations for up to three years, upon a showing that evidence of an offense is located in a foreign state and that an official request has been made to obtain such evidence, whether by letter rogatory, by request under a treaty, or through any other channel of international judicial assistance initiated by a court or prosecutor in the United States. The statute makes no provision for notice to the target of an investigation in these circumstances, but considerations of due process might call for notice to targets, particularly those that maintain routine record destruction programs geared to the period of limitations.

8. *Notification of opposition to U.S. requests for judicial assistance in criminal proceedings.* According to 18 U.S.C. § 3506, enacted as part of the Comprehensive Crime Control Act of 1984, Reporters' Note 6, when the United States has made an official request to another state for evidence of an offense, Comment *h,* any U.S. national or resident, and any person (regardless of nationality or residence) who is a party to a federal criminal proceeding, is required to serve on the U.S. Attorney General or the relevant U.S. attorney a copy of any submission made to a

court or other authority of the foreign state in opposition to such request. The statute makes no provision for sanctions for failure to comply with this requirement, though at least as to parties, the disciplinary powers of a court under the Federal Rules of Criminal Procedure may be available. Where the law of the state where the evidence is located grants interested persons the right to make a submission in opposition to disclosure, it would not ordinarily be consistent with international law for the U.S. Court to enjoin such submission or to impose sanctions on a person who has availed himself of that right.

9. *Obtaining expert testimony through letters rogatory.* Since evidence is normally taken abroad only if comparable evidence is not available in the forum state, the use of letters rogatory or other forms of international judicial assistance to take the testimony of experts is rare. However, letters rogatory may be used to secure the testimony of an expert located abroad when it is demonstrated that he has special knowledge not available in the forum, for example, an accountant who audited a party's books, Leasco Data Processing Equipment Corp. v. Maxwell, 63 F.R.D. 94 (S.D.N.Y. 1973), a foreign inventor of a product whose patentability is challenged, American Infra-Red Radiant Co. v. Lambert Industries, Inc., 32 F.R.D. 372 (D. Minn. 1963), or presumably an expert in foreign law.

10. *Subpoenas directed to persons outside the United States.* Under 28 U.S.C. § 1783, incorporated by reference in Fed. R. Civ. P. 45(e)(2) and Fed. R. Crim. P. 17(e)(2), subpoenas may be directed to persons in foreign states only if they are nationals or residents of the United States. Such subpoenas may be issued only by the court, not the clerk of court or a grand jury, as is permitted for subpoenas directed to persons in the United States, and they may be issued only "if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice" and, in other than a criminal proceeding, "if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner." The Senate Report accompanying the legislation that adopted the amended version of Section 1783, Pub. L. 88-619, 78 Stat. 995 (1964), states:

> In determining whether the issuance of a subpoena is in the interest of justice, the court may take into account the nature of the proceedings, the nature of the testimony or the evidence sought, the convenience of the witness or the producer of the evidence, the convenience of the parties, and other facts bearing upon the reasonableness of requiring a person abroad to appear as a witness or to produce tangible evidence.

S. Rep. No. 1580, 88th Cong., 2d Sess. 10 (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 3782, 3791; *see also* H.R. Rep. No. 1062, 88th Cong., 1st Sess. 10 (1963).

11. *Sanctions for non-compliance or perjury.* Under 28 U.S.C. § 1784, failure to comply with a subpoena properly issued by a federal court to a U.S. national or resident outside the United States is subject to punishment for contempt. See Blackmer v. United States, 284 U.S. 421 (1932), § 422, Reporters' Note 6. Under 18 U.S.C. § 1621, a person who swears falsely before any person authorized by U.S. law to administer oaths is guilty of perjury, whether the statement is made within or without the United States. Thus, a false sworn statement to a commission appointed by a U.S. court in accordance with Subsection (2)(a) or to a U.S. consular or diplomatic officer is subject to the penalties of perjury under U.S. law. Cf. § 403, Reporters' Note 8. A false sworn statement given in a foreign state to a foreign court or other authority would not be subject to punishment for perjury under U.S. law, even if the statement was given in response to a letter rogatory issued by a court in the United States.

SUBCHAPTER B. Extradition

. . .

§ 479 [489]. International Extradition Procedure: Law of the United States

(1) A request of a foreign state for extradition of a person in the United States may be filed in the State or federal court in whose jurisdiction the person is found.

(2) (a) The judge or magistrate with whom the request is filed may, upon pre-